

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

MONDAY, THE 23RD JULY 2007 / 1ST SRAVANA 1929

Bail Appl.No. 3829 of 2007()

O.R.NO.4/06 OF NARCOTIC CONTROL BUREAU, TRIVANDRUM
AGAINST THE ORDER IN CRMP 301 2007 IN
SC.10/2007 of ADDL.S.C.-TRIAL OF ABKARI ACT CASES, NEYYATTINKARA
.....

PETITIONERS/ACCUSED NO.1 AND 3

1. MUHAMMAD ASHKAR @ ASHKAR,
S/O RAUF, AGED 38 YEARS, HOUSE NO.30,
MANUDHAIMA VILLAGE, DIDOLY, JYOTHIBAFOOL NAGAR,
MORADABAD, UTHAR PRADESH.
2. SHAMIM AHAMMED @ SHAMIM,
S/O KALLU, AGED 35 YEARS, HIROLLAH,
MAFI VILLAGE, JYOTHIBAFOOL NAGAR, DIDOLY,
MORADABAD, UTTAR PRADESH.

BY ADV. SRI.SUNNY MATHEW

RESPONDENTS: COMPLAINANT

INTELLIGENT OFFICER,
NARCOTIC CONTROL BUREAU,
R.I.U.THIRUVANANTHAPURAM,
REPRESENTED BY THE STANDING COUNSEL FOR THE
NARCOTIC CONTROL BUREAU, HIGH COURT OF KERALA,
ERNAKULAM.

BY SRI.C.P.UDAYABHANU,S/C N.C.B

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION
ON 23/07/2007, ALONG WITH CRMC NO. 2054 OF 2007 THE COURT
ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

B.A.No. 3829 of 2007 &
Crl.M.C. No.2054 of 2007

Dated this the 23rd day of July, 2007

ORDER

The petitioners in these petitions are the accused in O.R. No.4 of 2006 of the Narcotic Control Bureau, Trivandrum. They face indictment for offences punishable under Sections 21(c), 27(A), 28 and 29 of N.D.P.S. Act. The crime was registered on 16.10.2006. Altogether there are three accused persons in the crime. The second accused has already been granted bail. In Crl.M.C.2054 of 2007, the Narcotic Control Bureau wants the said order of bail to be cancelled. Accused 1 and 3 have filed B.A.No.3829 of 2007. They pray that regular bail may be granted to them, they having remained in custody from 16.10.06.

2. The crux of the allegations in the crime is that 630 grams of heroin was transported from Morodabad in U.P. by accused 1 and 3. The contraband article was procured in U.P. and brought to Kerala by train by accused 1 and 3, by the third accused concealing the same in his shoes. The retail market was to be found in Kerala and the second accused allegedly was the retailer, who was responsible for

the distribution. All the three of them were intercepted by the Narcotic Control Bureau on 16.10.2006 in a room when they were allegedly making arrangements for the implementation of their scheme. The second accused came to this Court and on 18.5.2007 another Bench of this Court has granted regular bail to that accused.

3. In CrI.M.C.2054 of 2007, the Narcotic Control Bureau contends that bail was granted ignoring and without adverting to the provisions of Section 37 of the N.D.P.S. Act. The second accused, who was directed to report before the Investigating Officer on every Friday at 10 a.m. until the report is filed, has not reported before the Investigating Officer, it is further complained.

4. The challenge that the order has been passed by the other Bench of this Court without referring to Section 37 of the Act cannot of course be raised before me. The learned Standing counsel for the N.C.B. submits that steps are being taken to challenge the said order before the Supreme Court in as much as that order has been passed without reference to Section 37 of the Act. The N.C.B. has a chance of getting the said order over tuned, it is submitted. I need not advert to that contention at all.

5. Be that as it may, the next question is, whether there is any violation of the conditions by the second accused. The learned counsel for the second accused submits that the condition obliges the second accused to report before the Investigating Officer only until final report is filed. The final report has already been filed even prior to the date of the order i.e. 18.5.2007. In these circumstances the second accused had no obligation to report before the Investigating Officer on any day after 18.5.2007.

6. I find merit in that contention of the counsel for the second accused. In as much as there is no specific violation of the conditions of the bail, the prayer for cancellation of bail on the ground that there has been violation of the conditions cannot be accepted at all. CrI.M.C. 2054 of 2007 cannot therefore be allowed and deserves to be dismissed without any prejudice to the right of the N.C.B. to challenge the order granting bail before the Apex Court.

7. We now come to the bail application filed by accused 1 and 3. They were responsible for illicit possession and transportation of 630 grams of heroin. 5 grams is the small quantity prescribed for heroine. 250 grams is the minimum prescribed as commercial quantity. There can be no question therefore that the quantum of contraband article in respect of

which the violation is complained of is commercial quantity. There is no dispute on that aspect at all.

8. It is trite that in an application under Section 37 of the Act, if bail were to be granted to the petitioner, this Court has to be satisfied of the existence of both pre-conditions prescribed in Section 37 of the Act.

9. I have heard the learned counsel for the petitioners. I find absolutely no valid reason urged before me to instill the requisite satisfaction of existence of either of those two pre-conditions. Bail cannot hence be granted to the petitioners (A1 & A3).

10. The learned counsel for the petitioners submits that any and every opposition by the Prosecutor cannot be reckoned as an opposition for the purpose of Section 37 of the N.D.P.S. Act. In this context the counsel relies on the decision in **Jiju Maran v. Narcotic Control Bureau** (2004 (2) KLT 690. The N.C.B., which had not opposed the application for regular bail of the second accused, has no justifiable reason now to oppose the application of accused 1 and 3, contends the counsel. He wants this Court to consider the plight of accused 1 and 3 and the feeling of prejudice which they would entertain because the second accused have already been released on regular bail.

11. The learned Special Judge was addressed and I am informed that the matter has been posted for trial to 24.7.07 and 25.7.07 i.e. tomorrow and day after tomorrow. I have taken note of the fact that commercial quantity is involved. I have taken note of the fact that accused 1 and 3 had procured and transported the contraband article into the State of Kerala. I have taken note of the distinction between the contumacious role of the second accused on the one hand and accused 1 and 3 on the other. I have taken note of the submissions of the Standing counsel for N.C.B. that they want the order granting bail to be challenged and were waiting for the disposal of the CrI.M.C. to take further steps. In any view of the matter, I am unable to agree that the exercise of discretion by the Standing counsel for N.C.B. to oppose the application filed by accused 1 and 3 is in any way vitiated. The mere fact that the second accused has been granted bail does not in any way militate against the validity of the objection raised so far as the prayer for bail for accused 1 and 3 are concerned.

12. The matter is listed for trial to 24.7.07 and 25.7.07. I take note of the above fact and I expect the learned Special Judge to complete the trial and pass appropriate orders on merits.

13. These petitions are accordingly dismissed.

(R. BASANT)
Judge

tm